

2010

# Amy B. Bott v. Jessie Lee Osburn : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**AMY B. BOTT,**

Petitioner/Appellee,

vs.

**JESSIE LEE OSBURN,**

Respondent/Appellant.

Appellate Case No. 20100232

District Ct. Case No. 100400395

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**BRIEF OF APPELLANT**

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## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this case under Utah Code Ann. § 78A-4-103(2)(j).

## STATEMENT OF ISSUES

**Issue 1:** Did the trial court fail to properly apply Utah Code Ann. § 77-3a-101?

**Standard of Review:** "The proper interpretation and application of a statute is a question of law which we review for correctness, affording no deference to the district court's legal conclusion."<sup>1</sup>

**Issue 2:** Is the trial court's ruling in opposition to the clear weight of the evidence?

**Standard of Review:** "[W]e review the trial court's findings of fact for clear error, reversing only where [a] finding is against the clear weight of the evidence, or if we otherwise reach a firm conviction that a mistake has been made."<sup>2</sup>

**Issue 3:** Did the trial court fail to make specific findings with regard to each element of the stalking statute, thereby making it impossible to affirm that the Appellee met her burden of proof at trial?

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<sup>1</sup> Addendum, p. 102: *Abernathy v Mzik*, 2007 UT App 259, 167 P.3d 512, 514 (quoting *Gutierrez v Medley*, 972 P.2d 913, 914-15 (UT 1998).

<sup>2</sup> Addendum, p. 93: *Ellison v Stam*, 2006 UT App 150, 136 P.3d 1242, 1246 (quoting *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct.App. 1997).

**Standard of Review:** "The proper interpretation and application of a statute is a question of law which we review for correctness, affording no deference to the district court's legal conclusion."<sup>3</sup>

## **DETERMINATIVE PROVISIONS**

(Cases and Statutes set forth verbatim in the Addendum to this Brief)

### **Cases**

*Abernathy v Mzik*, 2007 UT App 259, 167 P.3d 512

*Ellison v Stam*, 2006 UT App 150, 136 P.3d 1242

*Towner v. Ridgeway*, 2008 UT 23, 182 P.3d 347

### **Statutes**

Utah Code Ann. § 76-5-106.5

Utah Code § 77-3a-101

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This is an appeal from a civil stalking injunction issued by the Honorable Steven L. Hansen of the Fourth Judicial District Court on February 8, 2010.

### **Course of Proceedings**

The Appellee Amy Bott ["Bott"] filed a petition for a civil stalking injunction and request for a temporary order against the Appellant Jessie Osburn

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<sup>3</sup> Addendum, p. 102: *Abernathy v Mzik*, 2007 UT App 259, 167 P.3d 512, 514 (quoting *Gutierrez v Medley*, 972 P.2d 913, 914-15 (UT 1998)).

["Osburn"] on January 19, 2010. The District Court issued a temporary civil stalking injunction ex parte order on January 20, 2010. A bench trial was held on February 8, 2010, with Bott being represented by counsel and Osburn appearing pro se.

At the close of trial, Judge Hansen instructed Bott's legal counsel to prepare a written order. When no written order was forthcoming within 30 days, Osburn filed a Notice of Appeal on March 9, 2010. On March 16, 2010, Bott's counsel finally filed the written order. However, the written order listed as 'protected persons' Bott's former husband and his adult son, who were then living with Osburn.

On March 18, 2010, Osburn filed a Motion for Stay of the Order Pending Appeal. On March 19, 2010, Bott's former husband and his adult son filed a motion dismiss the order as to them being listed as 'protected persons'; which the trial court denied on March 24, 2010. Bott's counsel filed an amended order on March 30, 2010 and an opposition to Osburn's motion for stay on April 6, 2010. The amended order no longer listed Bott's husband and his son as 'protected persons'. The trial court entered the Amended Civil Stalking Injunction on April 21, 2010. Osburn filed an Amended Notice of Appeal on May 20, 2010.

Bott's legal counsel withdrew and Bott appears pro se in this appeal. Osburn has obtained appellate counsel.

## **Disposition of Trial Court**

On February 8, 2010, the trial court granted Bott's petition for a permanent civil stalking injunction against Osburn. Osburn's motion for stay pending appeal was denied.

## **RELEVANT FACTS**

At some point in 2008, Bott learned that her husband was having an affair with Osburn.<sup>4</sup> Bott reacted toward Osburn and on June 26, 2008, Osburn filed a telephone harassment complaint with the Provo City Police Department, who responded by instructing Bott not to contact Osburn anymore.<sup>5</sup> Both Bott and Osburn filed civil stalking claims against each other in August 2008.<sup>6</sup> Both voluntarily dismissed their petitions once Bott's husband decided reconcile with Bott and return home.<sup>7</sup>

The relationship between Bott and Osburn calmed until Bott learned that her husband was once again seeing Osburn on December 2009.<sup>8</sup> Bott responded by calling Osburn 8 times on December 6<sup>th</sup>; 3 times on the 7<sup>th</sup>; twice on the 10<sup>th</sup>; once on the 11<sup>th</sup>; and, once on the 13<sup>th</sup>.<sup>9</sup> On December 15, 2009, Osburn again filed a

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<sup>4</sup> Addendum, p. 6-13: Trial Transcript, p. 6-13.

<sup>5</sup> Addendum, p. 116: Provo Police Department Call for Service (6/26/08).

<sup>6</sup> Addendum, P. 124-58: Civil Stalking Injunction (Osburn; Case No. 080915732); Addendum, p. 159-63: Civil Stalking Injunction (Bott; Case No. 080402481).

<sup>7</sup> Addendum, p. 3: Trial Transcript, P. 3, l. 11-20.

<sup>8</sup> Addendum, p. 11: Trial Transcript, P. 11, l. 3-5.

<sup>9</sup> Addendum, p. 110-14: Bott's Telephone Records.



complaint with the Provo City Police Department, who responded by instructing Bott not to have any contact with Osburn.<sup>10</sup> On January 15, 2010, Bott was arrested for allegedly trying to enter Osburn's residence and for doing \$2,320 of damage to Osburn's vehicle.<sup>11</sup>

The basis of Bott's civil stalking claim is that Osburn ostensibly threatened Bott during one of the telephone calls Bott made to Osburn on December 7, 2009, and again during the call Bott made to Osburn on December 13, 2009.<sup>12</sup>

### **SUMMARY OF ARGUMENT**

The ruling appealed from was issued by Fourth Judicial District Court Judge Steven L. Hansen on February 8, 2010. The trial on Bott's petition for a stalking injunction against Osburn lasted for a less than one hour, so the entire transcript has been included in the Addendum for the Court's convenience; and in the interest of mustering all the evidence.

Osburn asserts first that the trial judge failed to properly apply Utah Code Ann. § 77-3a-101. Next, Osburn asserts that there is insufficient evidence in the record to support the issuance of the civil stalking injunction against her on February 8, 2010. And finally, that the trial court failed to make the specific

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<sup>10</sup> Addendum, p. 115: Provo Police Department Crime Report.

<sup>11</sup> Addendum, p. 117-23: Springville Police Department LAW Incident Report.

<sup>12</sup> Addendum, p. 6-7: Trial Transcript, P. 6-7.

findings necessary for the Appellate Court “to review the question of whether [Osburn’s] conduct met the elements of the statute.”<sup>13</sup>

Bott’s husband had an affair with, and ultimately left Bott, to live with Osburn. At trial, Osburn argued that Bott’s sole purpose in filing the civil stalking petition was a futile attempt to preserve the remnants of her marriage, or to retaliate against Osburn for taking her husband away. Although she was unrepresented by counsel during the trial, Osburn presented evidence which substantially challenged Bott’s assertion that threats were made during the course of two telephone calls occurring on December 7<sup>th</sup> and 13<sup>th</sup>, 2009, and whether a conversation even took place on each of those dates. Nevertheless, it is an undisputed fact that on each occasion, it was Bott who pursued and made contact with Osburn.

The trial court’s ruling hinged on the fact that Judge Hansen ‘believed Bott a little bit more than Osburn.’ However, the trial court erred when it failed to make findings that Bott had proven each and every element of a civil stalking claim beyond a reasonable doubt. Even if Judge Hansen believed that the two telephone calls occurred and that the exact threatening words alleged were spoken, the trial court failed to find that this conduct would cause a reasonable person to suffer emotional distress under the totality of the circumstances. In addition, the ruling

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<sup>13</sup> Addendum, p. 88: *Towner v. Ridgeway*, 2008 UT 23, 182 P.3d 347, 351.

goes against the clear weight of the actual evidence, which shows that Bott could not have been too traumatized by the conversation that occurred on December 7<sup>th</sup> or she would not have been back on the telephone making repeated phone calls to Osburn over the following week.

While the trial record is replete with testimony that Bott was distraught over her husband's affair with Osburn and the breakup of her marriage, Bott presented absolutely no evidence that she was specifically affected by the telephone calls themselves. The trial court's ruling penalizes Osburn for having an affair, rather than for making two threats that caused Bott to suffer actual emotional distress. Again, the clear weight of the undisputed evidence is that rather than shrinking away from having any contact with Osburn after December 7, 2009, it was Bott who actively pursued and sought contact with Osburn.

Osburn presented evidence and argued forcefully that it was Bott who was the stalker and that Bott had initiated the telephone calls on December 7<sup>th</sup> and 13<sup>th</sup> in order to fabricate sufficient evidence to bring a civil stalking claim. It is an undisputed fact that Bott had brought a similar claim against Osburn in 2008 and was well versed in the requirements of a civil stalking claim. Also undisputed is the fact that Osburn dropped her 2008 claim once her husband stopped dating Osburn and went back to her. Nevertheless, Judge Hansen held that 'it was

reasonable to believe Bott' and 'that she could have made up something a lot worse.'

At the close of testimony, Judge Hansen took a recess to determine whether the fact that Bott was stalking Osburn would serve as an affirmative defense for Osburn, and concluded that it would not. Whether that conclusion was correct or not, the trial court erred in failing to take Bott's own conduct into account in the totality of the circumstances analysis. The trial court failed to ask the critical question of whether a reasonable person would be entitled to persistently badger another person and then get their feelings hurt when that person defensively snapped back.

The trial court failed to acknowledge that Bott was consistently invading Osburn's privacy and that, even if said, Osburn's threats were no more than a threat against Bott's further invasion of her privacy. Bott incited the threats by imposing herself where she had no legal right to be. Most reasonable people would say that if you keep sticking your nose where it doesn't belong, you are lucky if all you get is hurt feelings. There is no evidence that Osburn made threats in any other context than self-defense, or ever threatened to prevent Bott from doing anything that Bott had a legal right to do.

The trial court failed to acknowledge that self-defense is a defense to all sorts of conduct which would otherwise be offensive. However, under the totality

of the circumstances it was not necessarily extreme or outrageous for Osburn to tell Bott in no uncertain terms that she wanted to be left alone. And since it was Bott who kept initiating the contact, Osburn did not have the choice but to react to Bott's persistent invasions. Osburn's course of conduct was to knowingly and voluntarily avoid Bott. Osburn did not voluntarily choose to have Bott call her several times a day week after week, or to disseminate naked pictures and derisive emails to Osburn's family and friends. The civil stalking statute is not intended as a tool to resuscitate a failing marriage. Nor is it intended to serve as a weapon that an aggressor may use to target a foe and create two or more instances of conflict.

The trial court utterly failed to undertake the three part analysis required by *Towner v. Ridgeway*, 2008 UT 23, 182 P.3d 347. The trial court's ruling fails to take the totality of the circumstances into account and thereby rewards the aggressor who has intentionally engaged in a continuing course of outrageous conduct, and punishes Osburn for defending herself in the face of such conduct. The trial court erred in finding that Bott's conduct had no bearing on the issue. The trial court failed to take Osburn's intent into account at all. And, the trial court failed to make specific findings that Bott suffered actual emotional distress as a direct consequence of the two telephone calls.

Rather than follow the analysis required by the statute, Judge Hansen used the factual evidence only to determine the credibility of the parties and then

disregarded it completely. As such, the elements of a civil stalking claim have not been met and Bott did not meet her burden of proof. The civil stalking injunction issued by the Fourth Judicial District Court on February 8, 2010 should be quashed.

### **DETAIL OF ARGUMENT**

Osburn challenges whether Bott proved every element necessary for the issuance of a civil stalking injunction beyond a reasonable doubt. Specifically, Judge Hansen failed to properly apply the civil stalking statute, which lead to the actual stalker receiving the injunction. Judge Hansen erroneously excluded a consideration of the totality of the circumstances from his determination of whether each element had been met, and then failed to make findings as to each element.

Utah Code Ann. § 77-3a-101 states in pertinent part:

- (1) As used in this chapter, “stalking” means the crime of stalking as defined in Section 76-5-106.5. . . .
- (2) Any person who believes that he or she is the victim of stalking may file a verified written petition for a civil stalking injunction against the alleged stalker with the district court in the district in which the petitioner or respondent resides or in which any of the events occurred. . . .
- (7) . . . The burden is on the petitioner to show by a preponderance of the evidence that stalking of the petitioner by the respondent has occurred.<sup>14</sup>

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<sup>14</sup> Addendum, p. 77-78: Utah Code Ann. § 77-3a-101.

Utah Code Ann. § 76-5-106.5, specifically defines the terms “course of conduct”, “emotional distress”, “reasonable person”, and “stalking”.

A person is guilty of stalking who intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person: (a) to fear for the person’s safety or the safety of a third person; or (b) to suffer other emotional distress.<sup>15</sup>

In *Towner v. Ridgeway*, 2008 UT 23, 182 P.3d 347, the Utah Supreme Court held;

A district court must find that all three elements of this statute are met in order to enter a civil stalking injunction. First, the court must find that the alleged stalker "intentionally or knowingly engage[d] in a course of conduct" that would cause a reasonable person to fear bodily injury or suffer emotional distress. . . . Second, the court must find that the accused stalker had or should have had knowledge that the victim of his stalking would fear bodily injury or suffer emotional distress. And finally, the court must find that the victim actually feared bodily injury or suffered emotional distress as a result of the accused stalker's conduct.<sup>16</sup>

All of the trial court’s findings are contained in two sentences;

On the 7<sup>th</sup> and the 13<sup>th</sup> I find that she made those statements, one that she would, you said what she said you said that you would shoot my ass, and on the 13<sup>th</sup> she would shoot me. Both of those are clearly verbal threats that would cause a reasonable person to be afraid of you and cause her emotional distress.<sup>17</sup>

The trial court’s first point of error was whether Osburn knowingly and intentionally engaged in a course of conduct. The undisputed facts in the record

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<sup>15</sup> Addendum, p. 82: Utah Code Ann. § 76-5-106.5(2).

<sup>16</sup> Addendum, p. 88: *Towner v. Ridgeway*, 2008 UT 23, 182 P.3d 347, 351

<sup>17</sup> Addendum, p. 72: Trial Transcript, p. 72, l. 14-19.

are that from December 6, 2009 through December 13<sup>th</sup>, Bott placed 15 telephone calls to Osburn for the sole purpose of confronting Osburn about her relationship with Bott's husband.<sup>18</sup> Osburn did not invite or initiate this stream of calls. There is no allegation or evidence that Osburn ever initiated contact with Bott even once for the purpose of threatening Bott or to cause her emotional distress. It was Bott, not Osburn, who knowingly and intentionally created a confrontational situation, presumably to cause Osburn enough emotional distress to stop seeing Mr. Bott.

The trial court specifically disregarded the Appellate Court's instruction that "any evaluation of a defendant's conduct must be considered in the context of all of the facts and circumstances existing in the case."<sup>19</sup> Rather, in his ruling Judge Hansen stated;

What I wanted to look at under the law is was there any kind of a defense that you might have that she made the calls to you, which is what you've placed a lot of weight on here today that she's been calling you and that she called you and so, therefore, you didn't stalk her because she called you. And that really isn't a defense under the law. If someone calls you and then while you are on the telephone you threaten to shoot them twice on two different days, that's stalking.<sup>20</sup>

So according to Judge Hansen, there is no circumstance under which it is permissible to make a threat to someone over the telephone, even if that person has called to harass you as many as 8 times in a 2½ hour period. In *Ellison*, the Court

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<sup>18</sup> Addendum, p. 110-14: Bott's Telephone Records.

<sup>19</sup> Addendum, p. 96: *Ellison v Stam*, 2006 UT App 150, 136 P.3d 1242, 1248

<sup>20</sup> Addendum, p. 71: Trial Transcript, p. 71, l. 6-14.



of Appeals noted; “To call someone on the telephone and hang up late at night on one occasion may not rise to the level of outrageous conduct. To do so every ten minutes for a month, however, very well may.”<sup>21</sup> Judge Hansen disregarded the fact that Bott was engaged in an offensive course of conduct to which Osburn was an involuntary participant.

Furthermore, Judge Hansen disregarded circumstances which would have excused Osburn’s conduct even if threats had been made; which Osburn denied making at trial. First is the fact that Bott was well versed in the necessary elements of a civil stalking claim, having filed a similar claim against Osburn in August 2008.<sup>22</sup> Bott knew that if she harassed Osburn enough times, she could induce Osburn into losing her temper at least twice. Judge Hansen knew that Bott had twice been instructed by the Provo City Police Department from harassing Osburn over the phone. Judge Hansen also knew that Bott harbored an intense, personal dislike of Osburn because of the relationship between Osburn and her husband; and therefore had a strong motivation to fabricate a claim against Osburn. And Judge Hansen knew that Bott had been successful in recovering her husband by filing her previous 2008 stalking claim against Osburn.

Rather than viewing all of these facts in the context of whether Osburn was actually engaged in a course of conduct targeted at Bott, or whether it was the

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<sup>21</sup> *Id.*

<sup>22</sup> Addendum, p. 8: Trial Transcript, p. 8, l. 6-10.

other way around, Judge Hansen only used them to weight the credibility of the witnesses. Noticeably missing from the trial court's ruling is any mention that Osburn engaged in any of the activities which define a course of conduct in UCA § 76-5-106.5(1)(b). Osburn was not tracking Bott down at her home or place of business, nor 'surveiling' Bott, nor disseminating derogatory materials to Bott's family and friends. Rather, it was Bott who was doing these type of things to Osburn.<sup>23</sup> Osburn was merely sitting at home trying to endure Bott's incessant telephone calls. Judge Hansen disregarded Bott's conduct out of hand and ruled that Bott's conduct only spoke to the credibility of the witnesses, not on what they said;

And so my, my challenge today was who do I believe. Do I believe Amy Bott or do I believe you and a, and Mr. Bott as to the circumstances of what went on.

I'm not passing judgment on what's happened between you in your personal lives whatsoever. That's not before me today. But I have to decide was there persuasive evidence by a preponderance of the evidence, that's just a little bit more than the other side. Beyond a reasonable doubt is a higher standard of evidence.

Today we're just determining is there a little bit more in Amy Bott's favor than there is you. And I think there is, I think there is. I think that because of this intense communication that's gone on for an extended period of time here, and the anger and frustration that's gone on between the two of you over this affair and a, what's happened, it is reasonable for me to believe her and a, and that this is highly unlikely she would make something up of this magnitude in light of a, she could have made up a lot worse if she was a make up kind of story person, she could have made up a lot worse. This is bad but it could have been a lot more dramatic. She could have said it happened more

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<sup>23</sup> Addendum, p. 124-58: Civil Stalking Injunction (Osburn; Case No. 080915732)

than two times, she could have exaggerated it, she could have made a lot up if she was not telling the truth.<sup>24</sup>

The trial court's first error was disregarding the totality of the circumstances and failing to account for the fact that Osburn was not actively engaged in pursuing and harassing Bott at the time that the two threatening phone calls were made. In fact, it was Bott who was pursuing and harassing Osburn. The trial court's second error was ignoring the 'emotional distress' and 'reasonable person' standards set forth in UCA § 76-5-106.5(1)(d) & (e). "In *Harnicher v. University of Utah Medical Center*, 962 P.2d 67 (Utah 1998), the Utah Supreme Court explained that 'the emotional distress suffered must be severe; it must be such that a reasonable [person,] normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.'"<sup>25</sup>

A normally constituted person is unlikely to be surprised that it was possible to elicit angry words from someone if they were subjected to a sufficient amount badgering and harassment. It is almost certain that telephone solicitors and bill collectors hear these kinds of idle threats on a daily basis. Of course, taken out of context as Judge Hansen did, "I'll shoot your ass" sounds like it could be a serious threat. However, the exact words used in the alleged threats was never fully

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<sup>24</sup> Addendum, p. 71-72: Trial Transcript, p. 71-72.

<sup>25</sup> Addendum, p. 96: *Ellison v Stam*, 2006 UT App 150, 136 P.3d 1242, 1248

explored at trial and Bott's petition only says; "She told me Shane bought her a gun so she could shoot my ass if I come around."<sup>26</sup>

The record is devoid of any evidence that Osburn actually had a gun, that Osburn was violent or would have used a gun offensively against Bott, or most importantly that Bott actually believed that she would have. What the record does show is that on January 15, 2010 Bott was arrested for allegedly trying to break into Osburn's residence and doing \$2,300 damage to Osburn's car.<sup>27</sup> If Osburn did have a gun, she did not seize the opportunity to use it and Bott was apparently not afraid that she would. There is no allegation or evidence that Osburn ever made one aggressive move toward Bott, or made an offensive threat. The totality of the circumstances indicate that if a threat was made, Osburn made it solely in defense of her own privacy and only to deter further harassment by Bott.

Although Bott was understandably upset about the breakup of her marriage, Bott had no legal right to be harassing Osburn with incessant telephone calls. Osburn never threatened Bott to prevent Bott from doing anything that she had a legal right to do. By her own admission, Bott was engaged in a course of conduct that was precisely prohibited by UCA § 76-5-106.5. Bott's repeated telephone calls were specifically aimed at putting Osburn under enough emotional duress that

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<sup>26</sup> Addendum, p. 107: Civil Stalking Injunction (Bott; Case No. 080402481), p. 3.

<sup>27</sup> Addendum, p. 117-23: Springville Police Department LAW Incident Table, p. 2

she would be unable to handle the mental stress of continuing her relationship with Mr. Bott.

Conversely, the record shows that even if a threat was made, Bott either didn't take it seriously or that she was perfectly capable of handling whatever mental stress the threat may have produced. While there is voluminous testimony about how distraught Bott was about her husband's affair, Bott presented no evidence of any additional or distinct distress caused by the alleged threats. Bott's petition talks about the affair but does not mention the telephone calls at all.<sup>28</sup>

When asked by her counsel how she reacted to the calls, Bott's only comment was; "Just more or less like after, just I was emotion, like the whole thing has been an emotional roller coaster for me."<sup>29</sup> Bott's only other witness testified;

Q. Can you tell me a, in December 2009 a, what her demeanor was like, how she, how she responded to the, Jessie Osburn?

A. Amy has been a nervous wreck. She is severely distraught by communication with Jessie.

...

Q. And in a, the summer of 2008 do you know if she had any trouble with Jessie Osburn.

A. She's . . . I don't know the dates exactly. But for as long as a, I guess ever since she found out that her husband was having an affair on her she has been severely distraught.<sup>30</sup>

Bott offered no evidence that because of the alleged threats on December 7<sup>th</sup> and 13<sup>th</sup> she, for instance, missed work on December 8<sup>th</sup> or 14<sup>th</sup>, that she was

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<sup>28</sup> Addendum, p. 105-09: Bott's Request for Civil Injunction, p. 3.

<sup>29</sup> Addendum, p. 7: Trial Transcript, p. 7, l. 15-17.

<sup>30</sup> Addendum, p. 40: Trial Transcript, p. 40, l. 4-8 & 13-18.

compelled to seek the protection of law enforcement, or was otherwise unable to cope with the mental stress caused by the telephone calls. To the contrary, the record shows that Bott called Osburn 7 more times over the course of six days after the first threat was supposedly made.<sup>31</sup> The record also shows that Bott made no mention of either threat when the Provo City Police Department contacted her on December 15, 2009 to warn her against calling Osburn again.<sup>32</sup> What Bott did tell the police was that “she is very hurt and feels like she has been violated because Osburn would use her health condition as a ploy to keep in contact with [Mr.] Bott.”<sup>33</sup>

The trial court failed to make any of the requisite findings necessary for issuance of a civil stalking injunction and instead summarily disregarded the undisputed evidence necessary to make such a determination. The trial court erroneously held that two threats over the telephone constituted stalking no matter what the circumstances. The record shows that at best, Osburn was only responding to Bott’s harassment. With regard to the first element, it was Bott, not Osburn who was engaged in a targeted ‘course of conduct’ designed to impose emotional distress; but the trial Court determined that Bott’s conduct was irrelevant.

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<sup>31</sup> Addendum, p. 110-14: Bott’s Telephone Records.

<sup>32</sup> Addendum, p. 115: Provo Police Department Crime Report.

<sup>33</sup> *Id.*

With regard to the second element, the trial court needed to find that a reasonable person “in the victim’s circumstances”<sup>34</sup> would have been “unable to adequately cope with the mental stress engendered by”<sup>35</sup> Osburn saying that “she would shoot their ass if they came around.”<sup>36</sup> Of course, a reasonable person probably would not believe that they had a right to aggressively harass a person, even a mistress, without expecting some harsh words to be exchanged. And then there is the question of whether a reasonable person would have believed the threat even if it was made, given the context.

Here too, the trial court erred by failing to apply the statute and disregarding ‘the victim’s circumstances.’ The trial court should have acknowledged that Osburn was not standing on Bott’s front porch with gun in hand; rather, Bott was instigating all of the contact, and in a very confrontational and forceful way. The trial court should have taken into account Bott’s history of similarly compulsive and intrusive conduct toward Osburn, and the fact that this conduct combined with her 2008 civil stalking claim resulted in her husband coming back to her - at least for a time. Bott knew from past experience exactly what the minimum requirements were for bringing a civil stalking claim. Inextricably, the trial court ‘believed Bott a little bit more’ because she could of made up a bigger lie!?

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<sup>34</sup> Addendum, p. 82: UCA § 76-5-106.5(1)(e).

<sup>35</sup> Addendum, p. 96: *Ellison v Stam*, 2006 UT App 150, 136 P.3d 1242, 1248 (quoting *Harnicher v. University of Utah Medical Center*, 962 P.2d 67 (UT 1998)).

<sup>36</sup> Addendum, p. 107: Bott’s Request for Civil Injunction, p. 3.

The trial court's next error was to completely disregard Osburn's knowledge or intent. The Court's two-sentence findings make no mention of this element. Osburn had to 'knowingly and voluntarily' enter into a course of conduct and had to 'know' that that course will render the victim unable to adequately cope with the situation.<sup>37</sup> Certainly Osburn intended, or at least hoped, to get Bott to leave her alone. On the other hand, if Osburn did make a threat on December 7<sup>th</sup>, it did not have an appreciable effect on Bott's calling, so there is little basis to think making the same threat on December 13<sup>th</sup> would render Bott unable to cope. What the record does show is that Osburn dealt with Bott's calls by filing complaints with the police in 2008 and 2009 and having them instruct Bott to stop contacting her.<sup>38</sup>

The trial court completely disregarded these objective facts in favor of believing Bott's unsubstantiated allegation that threats were made 'a little bit more'. The trial court made no inquiry to determine whether Osburn might just have said something just to get Bott to stop calling her; which is short of saying it to intentionally make someone an emotional wreck. Instead, the trial court essentially ruled that Osburn's intent was irrelevant since, 'if someone calls you and while you are on the telephone you threaten to shoot them on two different days, that's stalking.' Presumably, this is true even if Osburn's only intent was to

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<sup>37</sup> Addendum, p. 82: UCA § 76-5-106.5(2).

<sup>38</sup> Addendum, p. 115 & 116: Provo City Police Department: Crime Report (12/15/09); Call for Service (6/26/08).



get Bott to quit calling her several times a day, and even if Bott instigated the situation with 'fighting words' of her own.

The trial court erred by failing to properly assess the final element of a civil stalking claim. The Court failed to find a nexus between the alleged threats and the emotional distress about which Bott complains. It is acknowledged that Bott has suffered emotionally from her husband's infidelity and the loss of her marriage. That is to be expected. However, the civil stalking statute is not intended to be a legal lasso to keep wayward husbands at home. Bott had the burden to prove by a preponderance of the evidence that the telephone calls on December 7<sup>th</sup> and 13<sup>th</sup> rendered her unable to adequately cope with the mental stress. Bott offered no objective evidence to meet this burden and only testified that the "whole thing had been emotional rollercoaster."<sup>39</sup>

The trial court erroneously accepted the emotional distress caused by the fact Bott's husband was having an affair as proof that Bott suffered emotional distress as a result of the telephone calls. In essence, Osburn was punished not for making threatening telephone calls but rather because she was having an affair with Bott's husband. Again, by ignoring the analysis required by the statute and disregarding the totality of the circumstances, the trial court improperly oversimplified the question before it. The trial court reduced the issue to; 'Who did Judge Hansen

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<sup>39</sup> Addendum, p. 7: Trial Transcript, p. 7, l. 15-17.

believe?’ Disregarding the context, the trial court reasoned; ‘Threatening to shoot someone could make a reasonable person distressed and Bott is obviously distressed, therefore the threats must have been made.’ Of course, this logic turns the analysis on its head; which is why a stalker was actually awarded a stalking injunction.

The trial court’s ruling goes against the clear weight of the evidence. However, because the trial court chose to disregard the majority of the evidence, the court failed to make sufficient findings with regard to the evidence so as to make a point-by-point challenge to, or review of, the court’s factual findings. With regard to the physical evidence, the trial court stated;

[A] lot of time and effort has been made here about the number of phone calls, the affairs that had gone on and a, and who called who and those types of things. I thought that was important to listen to because it, it had evidentiary weight in terms of a, determining in my mind whether or not Amy Bott was telling the truth about the two most important facts in this case which is what this case is about. It's not about the affair, and it's not about all of the a, photographs that were sent back and forth, it's not about your car that was allegedly damaged by Ms. Bott. Those are important, but they are for another day and another courtroom under different circumstances.<sup>40</sup>

Beyond this collective reference, the trial court makes no findings with regard to the evidence. The trial court acknowledges that its sole purpose for reviewing the evidence was to determine the credibility of Bott’s allegation that Osburn made the alleged threats on December 7<sup>th</sup> and 13<sup>th</sup>, not to conduct the

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<sup>40</sup> Addendum, p. 70: Trial Transcript, p. 70, l. 5-17.

analysis required by *Towner* and the statute. After concluding that it believed Bott ‘a little bit more,’ the trial court ended its analysis.

In a proper analysis based on the evidence, the trial court should have first recognized that Osburn was not voluntarily engaged in any sort of course of conduct directed at Bott. It was Bott who was actively engaged in a practice of repetitious, offensive conduct that the stalking statute is intended to curb. Osburn was trying to protect her privacy and Bott was violating the law. The trial court should have recognized that a reasonable person would not have put themselves in the position that Bott did, or been surprised that Osburn reacted to Bott’s harassment, or called Osburn up several times a day after being threatened the first time.

In the next step, the trial court should have recognized that words taken out of context have no meaning, or are susceptible to any meaning one chooses. The stalking statute is intended to deal with communications that are intended to cause harm and in fact do. The intent of the speaker and the susceptibility of the listener are both vital to a determination of whether a particular phrase is a serious threat, or an expression of fear and exasperation. The trial court should have taken note that Osburn was being pushed to the brink, and that Bott was no innocent frail flower.

And in the final analysis, the trial court should have recognized that Bott's emotional distress stemmed from the fact that her husband was unfaithful and not from anything Bott's incessant telephone call's might have incited Osburn to say. The trial court should have realized that Bott filed her civil stalking claim in hopes of getting her husband back one more time or to injure Osburn, and not because Osburn's conduct was so extreme and outrageous that Bott could no longer adequately function without the Court's protection.

Had the trial court not disregarded the evidence and used it instead to conduct the analysis required by the statute and this Court, the trial court could not have found in Bott's favor. However, since the trial court did not make the factual findings of the analysis required by the statute, the trial court's ruling goes against the clear weight of the evidence. The statute requires evidence that each element has been met, and there is none in the court's findings. The trial court's only findings were that Judge Hansen believed Bott 'a little bit more' therefore the calls were made, the threats were uttered, a reasonable person would be afraid, and Bott is emotionally distressed.

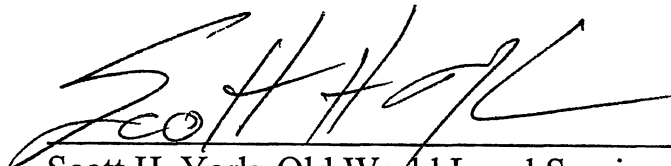
For a civil stalking injunction to issue, the District Court must first make specific findings that all the elements of the claim have been proven. If findings with regard to each of these elements does not appear in the record, as is the case here, the injunction cannot stand.

## CONCLUSION

The proper application of Utah Code Ann. § 77-3a-101 requires the proper application of Utah Code Ann. § 76-5-106.5. *Towner v Ridgway* requires the District Court to make specific factual findings as to each element of a civil stalking claim. The trial court failed to make any attempt to conduct the necessary analysis. The trial court erred by utilizing the evidence submitted at trial solely for the purpose of determining the credibility of the witnesses. The evidence in the record, and lack of evidence, is sufficient to show that the Appellee Amy Bott did not meet her burden of proving each and every element of her stalking claim beyond a reasonable doubt. However, the trial court failed to make sufficient findings to support a determination that the elements of a civil stalking claim have been met and therefore, the injunction cannot stand.

WHEREFORE, the Appellant Jessie Osburn respectfully requests the Utah Court of Appeals overturn the decision of the Fourth Judicial District Court and quash the Civil Stalking Injunction issued by Judge Steven L. Hansen on February 8, 2010.

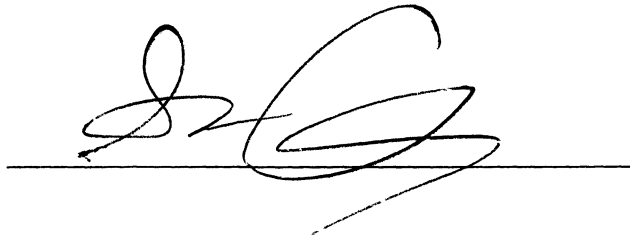
Dated this 12<sup>st</sup> day of October, 2010.

  
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Scott H. York, Old World Legal Services, PLLC  
Attorney for Appellant Jessie Osburn

## **CERTIFICATE OF SERVICE**

I certify that two true and correct copies of the foregoing Appellant's Brief were mailed by first class mail this 12<sup>st</sup> day of October, 2010 to the following:

Amy Bott  
2444 West 960 North  
Provo, Utah 84601

A handwritten signature in black ink, appearing to be 'Amy Bott', is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke at the end.